United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with affidavit of Mailing

76-1099

To be argued by
DOUGLAS J. KRAMER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1099

UNITED STATES OF AMERICA,

Appellee,

—against—

ERASMUS FLECHA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant Erasmus Flecha appeals from a judgment of conviction entered on January 26, 1976 after a jury trial in the United States District Court of New York (Weinstein, *J.*) on an indictment charging him, along with Jose Pineda-Marin, Hugo Suarez, Ernesto Santos Ganzalez, and Moises Banguera, with three counts of importing 287 pounds of marijuana into the United States of America, with possession of this marijuana with intent to distribute it, and with conspiracy to commit the above offenses, in violation of Title 21, United States Code, §§ 841(a)(1), 952 and 846.

Trial commenced on April 27, 1973 and was concluded on May 2nd, 1973 with guilty verdicts being returned as to all defendants on all counts, excepts as to defendant Banguera, upon whose motion the trial court dismissed counts 1 and 2 at the close of the Government's case.

Defendants Pineda-Marin, Suarez and Gonzalez were sentenced on July 26, 1973 and defendant Banguera was sentenced on July 21, 1973. Appellant was initially sentenced on September 17, 1973 *in abstentia*. An appeal was subsequently filed by appellant on October 1, 1973. Thereafter, appellant moved to set aside the previous sentence and on January 9, 1974 this sentence was set aside, notwithstanding the pending appeal, and appellant was sentenced to four years imprisonment with two years special probation.

Following this new sentencing, the previous appeal was withdrawn by stipulation dated January 22, 1974, and "so ordered" by Judge Oakes on February 4, 1974.

Meanwhile all the other defendants proceeded to perfect their appeals, challenging, *inter alia*, the sufficiency of the evidence against them, as well as raising several other issues. Their convictions were summarily affirmed on March 7, 1974 without opinion.

On October 22, 1975 appellant moved pursuant to Title 28, United States Code, § 2255 for vacatur of his sentence on the grounds that he had not, at his January 9, 1974 sentencing, been notified of his right to appeal as is required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. Notwithstanding that appellant actually had an appeal pending at the time of his January 9, 1974 sentencing and that after that sentencing appellant withdrew the appeal, Judge Weinstein granted appellant's motion on January 23, 1976, re-sentenced him to the same sentence with credit for time served and reentered judgment. It is from this judgment that appellant appeals.

Appellant raises only one issue on this appeal: whether the failure of the trial judge to grant his application

for a limiting instruction as to a statement by a co-defendant requires reversal.

Statement of Facts

At approximately 11:30 A.M. on March 25, 1973 the "Francisco Miguel," a freighter of Colombian registry, arrived in New York and tied up at the State Pier, in Brooklyn (T. 166).[1] That evening, at approximately 9:00 P.M., Customs Agents, acting under the direction of Special Agent John Greico, placed the vessel under surveillance from eight observation posts surrounding the ship (T. 166-69; Gov't Ex. 1). This surveillance was predicated upon information received from the Galveston, Texas, office of the United States Customs Service to the effect that this vessel was suspected of being used to transport narcotics to this country (H.T. 44, 50, Hearing Ex. # 4).

Agent Greico, who was situated in an office overlooking the stern of the vessel, observed Suarez and Pineda-Marin, both crewmen, in conversation on the deck of the ship between the hours of 10:00 P.M. and 12:00 midnight (T. 172). Special Agent Robert Graham, who joined Greico in the office observation post at about midnight, observed the appellant Flecha on the deck. Flecha, however, was not a crew member and was not authorized to be on the ship at that time (T. 397-98). Graham observed Flecha, Pineda-Marin, and Suarez conversing together on at least four occasions between 12:00

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[1] Page references preceded by "Tr." refer to the minutes of trial; references preceded by "H.T." refer to the minutes of a pretrial hearing.

and 1:50 A.M. (T. 304-05).[2] On one occasion, all three entered a hatchway at the rear of the ship (T. 305). At trial it was brought out that, between 12:00 A.M. and 4:00 A.M., Suarez was the deck watchman on the ship (T. 396).

At approximately 1:50 A.M., Agents Graham and Greico observed four men exit the rear hatchway of the ship, which earlier Flecha, Pineda-Marin and Suarez had been observed entering. The men dragged four large bales from the hatchway to a point amidship on the starboard side of the vessel, which was the side away from the pier (T. 175-76, 306). Agent Graham identified Pineda-Marin and Flecha as being two of the four men dragging the bales; Greico identified Gonzalez, Flecha and Pineda-Marin (T. 174-76, 306). Graham and Greico shared a pair of field glasses at this observation post, which was approximately 50 feet from the stern of the ship and each used the binoculars for their observations (T. 173, 306, Gov't Ex. # 3). It had been raining continuously from about 12:00 midnight on (T. 177).

The area to which the men carried the bales on the starboard side of the ship was not lighted, unlike the identical area on the port, or land, side of the vessel, which was illuminated (T. 191).

At approximately 1:55 A.M., five minutes after Flecha, Gonzalez and Pineda-Marin and the fourth, unidentified individual had been observed taking the bales onto the deck, Special Agent Henry Maurer who had been assigned to another observation post situated on a tugboat near the ship (T. 350), observed six men enter the pier area through a hole in the fence and scurry to the vicin-

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[2] Flecha and Suarez were also observed conversing on the deck near the gangplank, on the port side of the vessel, by Special Agent Eugene Weinschenk (T. 331).

ity of a grain elevator building near the bow of the ship (T. 351, Gov't Ex. # 19). After observing this occurrence Agent Maurer lost sight of these men (T. 352).

At approximately 2:00 A.M., Special Agent Eugene Weinschenk, who was at an observation post inside the grain elevator building near the bow of the ship, observed two men run in a crouched position out onto a pier past the bow of the ship.[3] Once past the bow of the ship, one of the men grabbed a wire hanging from a piling and slid into the water. The other man, later identified as Banguera, remained crouching at the piling (T. 327, 328, Gov't Ex. # 14). The man who went into the water swam toward the bow of the ship (T. 351).

This information was communicated to Agent Greico via radio, and the decision was made to close in (T. 329). Flecha, Pineda-Marin and Gonzalez were apprehended aboard the ship. Banguera was arrested on the pier, where he had remained crouching against the piling (T. 360, 361-64).

Special Agent Victor Cabrera was one of the first agents to board the ship. He and Agent Muniz ran up the gangplank on the port side of the vessel, where they found Suarez and Pineda-Marin (T. 361). While Muniz remained with these subjects, Cabrera ran through a passageway to the starboard side of the ship (T. 361). There Cabrera spotted two individuals, later identified as Flecha and Gonzalez, running from the middle of the ship toward the stern. The agent announced his identity

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[3] The vessel was tied up parallel to the land between two piers jutting out into the Gowanus Canal. The pier on which these two individuals were observed was at the bow end of the vessel. This scene is depicted in Government Exhibit 1, an aerial photograph of the ship and the surrounding pier area.

and ordered them to stop, but they continued running. Cabrera fell on the wet deck and his gun went off. At this point Gonzalez stopped, but Flecha continued running and went down the rear hatchway of the ship. He was apprehended at the entrance to the crew's quarters below deck (T. 361-64).

After the five defendants had been rounded up, Gonzalez was overheard saying to Flecha in Spanish "Why so much excitement? If we are caught, we are caught" (T. 365-66).

Subsequent to the defendant's arrest, four bales covered with oil-soaked burlap were discovered at the place on the ship where earlier Agents Grecio and Graham had seen the four men dragging the bales (T. 174). These bales contained a total of 287 pounds of marijuana (T. 88, 302; Gov't Exs. 5, 5A). An extensive but unavailing search was conducted for the "frogman" (T. 239).

At trial, Manuel Resdredo, Captain of the Francisco Miguel, testified as a Government witness. He testified, *inter alia*, that Pineda-Marin and Suarez were crew members but Gonzalez and Flecha were not (T. 398).

Captain Resdredo also testified that Suarez was the security watchman on duty from 12:00 A.M. until 4:00 A.M. and that when he (Resdredo) came aboard the ship at approximately 1:45 A.M. (T. 443) Suarez informed him that nothing was amiss. It was part of Suarez's duties as watchman to report the presence of unauthorized personnel on board (T. 397). Suarez also failed to inform the Captain that the lights were out on the starboard side of the ship in the place where the bales of marijuana had been positioned (T. 434).

ARGUMENT

The refusal of the court to give a limiting instruction as to co-defendant Gonzalez' statement to appellant Flecha was not reversible error.

Following the boarding of the ship by Government agents a chase ensued at the end of which Flecha and Gonzalez were apprehended. They were brought together with the other apprehended defendants, Suarez, Pineda-Marin, and Banguera (T. 364). The captain of the ship, Resdredo, confronted the defendants and identified some as belonging to the ship and some, including Flecha, as not being members of the crew (T. 387). About seven or eight minutes after Flecha's arrest, after the captain had identified the defendants and while the captain was talking to Agent Greico, Agent Cabrera testified that he overheard the defendant Gonzalez say in Spanish, apparently to Flecha, "Why so much excitement? If we are caught, we are caught" (T. 365-6).

Following an application for a limiting instruction to Flecha, the Court determined that Flecha was six to twelve inches from Gonzalez when the statement was made (T. 366). The Court thereupon denied the application (T. 367).

It is the position of the Government that Flecha's failure to comply with the requirement of Rule 51 of the Federal Rules of Criminal Procedure that the grounds for objection be made known prevents him from raising the issue of the Court's ruling denying the limiting instruction. Further, the denial of the application was proper because Flecha had adopted the statement of Gonzalez by his silence. Finally, even if the trial judge was in error in denying the application, the error was harmless in light of the other evidence against Flecha in the case.

A. Flecha failed to preserve his objection to the admission of Gonzalez' statement

Following the testimony of Agent Cabrera about Gonzalez' statement the defendants Banguera, Suarez, and Pineda-Marin requested an instruction that Gonzalez' statement was not binding on them. Immediately previous testimony of Agent Cabrera had established that these defendants were not standing next to Gonzalez (T. 364-65). The Court granted the application. Flecha then joined in the application without stating the grounds for his request. The Court conducted a brief *voir dire* to determine how close Flecha was to Gonzalez and upon determining that they were only six to twelve inches apart, it denied the application. No request was made by Flecha's attorney for further *voir dire*.

Rule 51 of the Federal Rules of Criminal Procedure requires that "a party, at the time of the ruling or order of the Court is made or sought, [make] known to the Court the action which he desires the Court to take on his objection to the action of the Court and the grounds therefore. . . ." The reason why the grounds for an objection or request must be set forth are well stated in *United States* v. *Bryant*, 480 F.2d 785, 792-93 (2d Cir. 1973). By stating the specific ground for objection the Court is afforded an opportunity to remedy any claimed error and the Government is given an opportunity to come forward with evidence relative to the claim of admissibility. This Court noted in *Bryant*:

> "[U]pon proper objection at trial, the judge might have conducted a voir dire into the circumstances before admitting in the evidence. . . ."

Id. at 793. See also *United States* v. *Rose*, 525 F.2d 1026, 1027 (2d Cir. 1975); *United States* v. *D'Amico*, 408 F.2d 331, 332 (2d Cir. 1969); *United States* v. *Fendley*, 522 F.2d 181, 186 (5th Cir. 1975).

The wisdom of this rule is particularly well taken in the instant case. The apparent basis for the request for limiting instructions by the other three non-declarant defendants was their lack of proximity to Gonzalez. This had just previously been established by testimony of Agent Cabrera. Accordingly, the Court granted the application. But Agent Cabrera had just testified that Flecha was next to Gonzalez (T. 366). Accordingly, the Court conducted a *voir dire* to determine how close Flecha was to Gonzalez and, upon being satisfied on this point, denied the application.

Now for the first time, Flecha is attempting to raise a much broader objection to the admission of Gonzalez' statement as against him.[4]

Had Flecha articulated the grounds for objection to the admission of Gonzalez' statement against himself before the trial court, a more extensive *voir dire* could have been conducted and the facts relating to admissibility would have been more fully developed. Flecha's failure to properly state the grounds for his request must now bar him from raising the denial on appeal.

B. Flecha's application for a limiting instruction was properly denied

Gonzalez' declaration to Flecha was relevant and properly admitted as to Flecha as an adoptive admission

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[4] Flecha characterizes Gonzalez' statement as hearsay. It is not. It was not admitted for its truth, but rather for what it indicated about Gonzalez' and Flecha's state of mind. Its probative value lay in its utterance and was in no way dependent on the veracity of the out-of-court declarant. See e.g. *Anderson* v. *United States*, 417 U.S. 211, 219-222 (1974). *Accord* Rule 801 (c), Federal Rules of Evidence. It also is not hearsay under the theories described in Rule 801(d)(2) of the Federal Rules of Evidence.

of Flecha's relation to Gonzalez and the familiarity between the two men. See Rule 801(d)(2)(A), Federal Rules of Evidence.

As a general rule a declaration by a defendant in the presence of another defendant is admissible against the non-declarant when he fails to deny the statement and where circumstances and the nature of the statement are such as would warrant the inference that the non-declarant would have naturally contradicted it if he did not assent to it. *Sparf* v. *United States*, 156 U.S. 51, 56 (1895), 4 Wigmore Evidence (J. Chadbourn ed. 1972) § 1071, C. McCormick, Evidence § 270 (E. Cleary ed. 1972). See also *Brown* v. *United States*, 411 U.S. 223, 230 (1973) (The court notes that the statements were *not* made in the other defendant's presence), *United States* v. *Haili*, 443 F.2d 1295, 1300 (9th Cir. 1971).

Under the general rule, the statement of Gonzalez was clearly admissible against Flecha. The trial judge elicited sufficient facts to sustain a reasonable inference that Flecha heard the statement directed at him in that he was six to twelve inches from Gonzalez. See *Moore* v. *United States*, 522 F.2d 1068, 1076 (9th Cir. 1975). The statement was one calling for a response because it addressed Flecha with the plural "we", included Flecha in Gonzalez' predicament, and was phrased as a question. In the light of Flecha's defense, developed through cross-examination of Government agents (e.g. T. 250) and in summation (e.g. T. 525) that Flecha was an innocent bystander visiting other innocent crew members, Flecha's silence would not normally be expected in response to Gonzalez' statement-question including Flecha in the enterprise.

Flecha argues that, notwithstanding the general rule, the fact that he was under arrest bars the use of his silence to imply adoption of Gonzalez' statement.

Flecha cites *United States* v. *Hale*, 422 U.S. 171 (1975) for the proposition that Flecha had a right to remain silent and that his silence could not be used against him.

In *Hale*, the Supreme Court stated the general principle concerning silence:

> "Silence gains more probative weight when it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation."

Id. at 176.

In *Hale*, the defendant failed to offer exculpatory information at the time of his arrest in response to police accusations. This silence was offered to impeach an alibi defense at trial, where the prosecutor asked the defendant why he had failed to give his alibi when questioned after arrest. This was held to constitute reversible error.

Hale is clearly distinguishable from the case at bar. Flecha was not questioned by the police and had not been given *Miranda* warnings. See *United States* v. *Wiley*, 519 F.2d 1348, 1350 n.4 (2d Cir. 1975). While both he and Gonzalez were in custody, Gonzalez' remark in Spanish was intended to be private, and thus it was not made in the context of an interrogation; it was not even made with the intent that the Government agents overhear it. Furthermore, Gonzalez' statement was neither a confession nor an accusation of wrongdoing so much as it was a confirmation that he and Flecha were

working together, thus corroborating the earlier testimony of agents who saw Flecha and Gonzalez drag four bales from inside the ship to the unlighted side of the ship (e.g. T. 175-76, 306).

In *United States* v. *Moore*, 522 F.2d 1068 (9th Cir. 1975), also cited by Flecha, the Court of Appeals held that a statement by one defendant to a third party, made in the presence of another defendant, was not admissible against the non-declarant as an admission by silence or acquiescence, notwithstanding the general rule that:

> "[w]hen an accusatory statement is made in the defendant's presence and hearing, and he understands and has an opportunity to deny it, the statement and his failure to deny are admissible against him. [cases cited]."

Id. at 1075.

In *Moore* the trial court had instructed the jury that they could consider the statement against the non-declarant if they found that he had heard it, could be expected to comment on it, had an opportunity to do so, and manifested his belief in the statement's truth. *Id.* at 1075.

After discussing the prerequisites to allowing an adoptive admission, the court held that the evidence was insufficient to support a finding that the non-declarant heard and understood the statement. *Id.* at 1076.

In the case at bar there is a sufficient basis to find that Flecha heard Gonzalez and that he acceded to the inclusion in the "we" by his silence. Following denial of his general application for a total limiting instruction, Flecha did not request an instruction to the jury as to under what circumstances they should consider the evidence. See *Moore, supra.* 522 F.2d at 1075.

While not cited by the appellant, two recent cases have dealt with the question of admission by silence after arrest.

In *United States* v. *Yates*, 524 F.2d 1282 (D.C. Cir. 1975) an admission by one defendant to police officers in the presence of another defendant, after their arrest, was held not to be admissible against the non-declarant. Both defendants were in custody, in a police car and in the presence of two policemen. The declarant spoke to a police officer and directly implicated the non-declarant. The hearsay evidence of this admission was allowed by the trial court on the grounds that the non-declarant was seated next to the declarant when the remark was made and he tacitly admitted the truth of the statement by failing to deny it. *Id.* at 1285.

The Court of Appeals held that in light of the circumstances, the custody and presence of the police, and in light of the non-declarant's "prospective denial" made before the admission, it would not naturally be expected that the non-declarant would contradict the statement. *Ibid.* The court treated the non-declarant's silence as an exercise of his Fifth Amendment right to remain silent and noted that the constitutional protection did not vanish because a third party made the statement in the presence of the police. *Id.* at 1285, n.8.

In distinction to *Yates*, neither Gonzalez nor Flecha were under interrogation by the Government agents. Nor was Gonzalez' statement intended to be made in the presence of law enforcement officials, rather it was in tended to be a private communication. Flecha's silent acquiescence clearly adopted Gonzalez' statement linking the two of them.

In *United States* v. *Adams*, 470 F.2d 249 (10th Cir. 1972), the Court of Appeals also reaffirmed the general

rule of adoptive admission by silence. *Id.* at 251. But it held that a post-arrest statement to a police officer in the presence of another defendant who had just been given his *Miranda* warnings was not admissible against the non-declarant. The court noted that not only had the declarant just been given his warnings, but that the statement to which he did not respond was both exculpatory and inculpatory. Nevertheless, the court held the admission of the statement to be harmless error. *Id.* at 251.

In *United States* v. *Yates*, *supra*, 524 F.2d at 1285-86 the Court of Appeals also, *sua sponte*, declined to allow the testimony under the general exceptions found in Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence, concluding that the Confrontation Clause of the Sixth Amendment would ban any attempt to admit the evidence. Reasoning from *Dutton* v. *Evans*, 400 U.S. 74, 88-89 (1970), the *Yates* court held the admission of the co-defendant's statement to be constitutionally impermissible because it was self-serving, represented half of the Government's rebuttal case, and was far from "peripheral." The court also noted that the non-declarant attempted to call the declarant, but he asserted his Fifth Amendment privilege. *Id.* at 1286.

In the case at bar, Gonzalez' statement was obviously reliable. Independent, undisputed evidence showed that Flecha and Gonzalez were indeed "caught," both being under arrest. Other independent evidence placed them together prior to the arrest, when they dragged the bales of marijuana togther. Furthermore, the statement was in no way self-serving or exculpatory, nor was it "crucial" or "devastating." It did not directly implicate Flecha in any wrongdoing, but only placed him in a common enterprise with Gonzalez. The admission of Gonzalez' statement did not deny Flecha his right to confrontation.

C. If there was error it was harmless

Even if the trial Court erred in denying the limiting instruction, the error was harmless in light of the overwhelming evidence against Flecha.

Improperly admitted hearsay statements by co-defendants do not automatically constitute reversible error. *Harrington* v. *California*, 395 U.S. 250 (1969); *Schneble* v. *Florida*, 405 U.S. 427 (1972); *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *United States* v. *Williams*, 523 F.2d 407 (2d Cir. 1975); *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975).

In *Schneble* v. *Florida*, *supra*, 405 U.S. at 430, dealing with a *Bruton* error of constitutional dimension, the Court stated:

> "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."

After examining the independent evidence of guilt and finding it overwhelming, and having noted that the inadmissible statements of the co-defendant at most tended to corroborate details properly proved, and after having examined the record to determine the probable impact of the inadmissible statements on the minds of the average jury, the Court concluded, *Id.* at 433:

> "Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. . . . In this case, we conclude that the minds of an average jury would not have found the State's case significantly less persuasive had the testimony as to the [admission] been excluded."

In *Brown* v. *United States*, *supra*, the Supreme Court held that post-arrest statements by co-defendants not made in each others presence were inadmissible, but held the admissions to be harmless following an independent examination of the record which found them to be merely cumulative of other overwh[illegible]ng and largely uncontroverted evidence. *Id.* at 230-232. Improperly admitted hearsay was also held to be harmless where it could be characterized as surplusage. *United States* v. *Campanile*, *supra*, 516 F.2d at 292.

The evidence against Flecha other than the disputed statement by Gonzalez was overwhelming both as to the substantive offenses and the conspiracy. Flecha was first observed on the deck of the Francisco Miguel at about midnight, an unusual time for even a crew member other than the watch and particularly unusual for one who was neither a crew member nor one authorized to be on board. Flecha was observed conversing with the two crewmen defendants, Suarez and Pineda-Marin on several occasions between 12:00 and 1:50 A.M., but Suarez, the deck watchman, never reported Flecha's presence to the Captain. Besides Flecha's unexplained and unreported presence on the ship, the evidence has him assisting in dragging four bales, three eighty pound and one forty pound, of what was proven to be marijuana. Other evidence placed Flecha in the very part of the ship where the marijuana was located when Agent Cabrera boarded the ship and documented his flight at the approach of Cabrera.

This is far more than the "mere presence" argued by Flecha and overwhelmingly supports a verdict against Flecha on both the substantive and conspiracy counts. See e.g. *United States* v. *Baity*, 464 F.2d 570 (5th Cir. 1972); *United States* v. *Vigil*, 448 F.2d 1250 (9th Cir. 1971).

As was argued above, the disputed statement itself was merely surplusage, a statement of fact, "if we are caught, we are caught", merely corroborating the fact that Gonzalez understood himself and Flecha to be under arrest. The statement was hardly an admission of guilt and, other than linking Flecha and Gonzalez, it added little to the case.

Lastly, it is clear in this case that the failure to give the limiting instruction for Flecha had no effect whatsoever on the jury. The limiting instruction was given as to the other three defendants (T. 366), yet all were found guilty, Pineda-Marin and Suarez of all the counts and Banguera on the conspiracy count. The case against Pineda-Marin and Suarez was far less persuasive than that against Flecha. Pineda-Marin was a crewman who had no business being topside in the middle of the night. Suarez, the night watchman, was not even observed handling the bales of marijuana. Banguera was never even aboard the ship. Yet the jury convicted all of them and their convictions were sustained on appeal.

Thus the failure to give a limiting instruction as to Flecha had no discernible effect on the outcome of the trial and, even if improper, should be deemed harmless error.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
May 10, 1976

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—353—207

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of May 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Jonathan J. Silbermann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U. S. Courthouse
Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
10th day of May 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618291
Qualified in Queens County,
Term expires March 30, 1977